INDEX

Subject Index

	Page
Opinions of the Court Below	1
Jurisdiction	2
Statement of the Case	2
Manner in which Federal Questions were Raised	7
Principles and Propositions	8
Brief and Argument	15
Certificate	28

TABLE OF CASES

Ala. Power Co. v. Dailey, 31 Ala. Appr. 44, 18 So. 2d, 142 ..... 12, 21

Ala. Home B. & L. Ass'n v. Amos, 233 Ala. 367, 172 So. 103 15

Boyd v. Nebraska, 143 U. S. 135, 36 L. ed. 103, 12 S. Ct. 375 13

Box v. Box, 247 Ala. 291, 24 So. 2d, 28 8

Bush Electric Co. v. Electric Impr. Co., 51 Fed. 557, 2 C. C. A. 373 8

Broad River Power Co. v. State, etc., 281 U. S. 537, 50 S. Ct. 401, 74 L. ed. 1023 10

Bellview Cemetery Co. v. McEvers, 174 Ala. 457, 57 So. 375 13

Carter v. Carter, 225 Ala. 287, 142 So. 514 8

Collins v. Metro-Goldwyn Pict. Corp., 106 Fed. 2d, 83 9

INDEX—(*Continued*)

	Page
Covington, etc., Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 S. Ct. 198	13
Centr. Ves. R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 38 S. Ct. 535	14
Dinsmore v. J. H. Calvin & Co., 216 Ala. 503, 113 So. 522	9
Dudley v. Whatley, 245 Ala. 202, 16 So. 2d, 192	9
Davis v. Wechsler, 263 U. S. 22 68 L. ed. 143, 44 S. Ct. 13	13
Ex parte Elyton Land Co., 104 Ala. 88, 15 So. 939	8, 16
Ex parte Bibb, 44 Ala. 140	9
Evans v. Wilhite, 176 Ala. 287, 58 So. 262	15
Finley, et als. v. Tarrant City, et als., 32 So. 2d, 806	10, 11, 17
Fox River Paper Co. v. R. R. Comm, 47 S. Ct. 669, 274 U. S. 651, 71 L. ed. 1279	10
First Nat. Bank, etc., v. Anderson, 46 S. Ct. 135, 269 U. S. 341, 70 L. ed. 295	10
Galloway v. Gen'l Motors Accept. Corp, 106 Fed. 2d, 466	9
Heard v. Brooklyn, 60 N. Y. 242	12
Hanley v. Donaghue, 116 U. S. 1, 29 L. ed. 535, 6 S. Ct. 242	13
In re State, etc., on Foreign-Held Bonds, 82 U. S. 300, 15 Wall. 300, 21 L. ed. 179	12
Joiner v. Patterson, 47 S. Ct. 706, 274 U. S. 544, 71 L. ed. 1194	10

FILED THROUGH POOR COPY

	Page
Johnson v. Risk, 137 U. S. 300, 11 S. Ct. 111, 34 L. ed. 683	11
Jackson v. Bohlin, 16 Ala. App. 105, 75 So. 697	13
Lovell v. City of Griffin, Ga., 303 U. S. 444, 58 S. Ct. 666, 82 L. ed. 949	10
Leathe v. Thomas, 207 U. S. 93, 28 S. Ct. 30, 52 L. ed. 118	11
Mutual Reserve, etc., v. Smith, 169 Ill. 264, 48 N. E. 208	8
Moorer v. Chastain, 247 Ala. 676, 26 So. 2d, 75	8
Moreno v. United States, 120 Fed. 2d, 128	9
Matthews v. Matthews, 247 Ala. 472, 25 So. 2d, 259	9
Mitchell v. Clark, 110 U. S. 643, 28 L. ed. 283, 4 S. Ct. 170	13
May v. Lowery, 214 Ala. 230, 107 So. 67	15
Northern Ohio T. & L. Co. v. State of Ohio, 38 S. Ct. 196, 245 U. S. 574, 62 L. ed. 481	12
New Orleans, etc., R. Co. v. Harris, 247 U. S. 367, 62 L. ed. 1167, 38 S. Ct. 567	14
Pollack v. Stouts Mt. Coal Co., 184 Ala. 331, 63 So. 531	9
Penn v. Platt, 47 Ohio St. 366, 25 N. E. 1028	12
Parker v. Fuller, 248 Ala. 457, 28 So. 2d, 207	13
Rees v. City of Watertown, 86 U. S. 107, 19 Wall. 107, 22 L. ed. 72	12
Rogers v. Alabama, 192 U. S. 226, 48 L. ed. 417, 24 S. Ct. 257	14

INDEX—(*Continued*)

	Page
South, etc., R. Co. v. Highland, etc., R. Co., 104 Ala. 233, 16 So. 112	8
Strong v. Brooklyn, 68 N. Y. 1	12
Seaboard, etc., R. Co. v. Renn, 241 U. S. 290, 60 L. ed. 1006, 36 S. Ct. 567	14
Thompson v. Murphy, 93 Fed. 2d, 38	9
The People v. Lawrence, 54 Barb. (N. Y.) 589	12
Tyler v. Copham, 245 Ala. 151, 16 So. 2d, 316	15
United States v. Pink, 62 S. Ct. 552	10
Washington v. Beeman, 91 Fed. 232	9
Ward v. Love County, 253 U. S. 21, 64 L. ed. 758, 40 S. Ct. 419	14
Wynn v. Tallapoosa, etc., Bank 168 Ala. 469, 53 So. 228	8
Worthington v. Worthington, 215 Ala. 447, 111 So. 224	9

INDEX—(*Continued*)

STATUTES AND CONSTITUTIONS

Page

Section 237(a) of the Judicial Code, as amended, 28 U. S. C. A., Sec. 344(a) 2

Code of Ala., 1940, Sections 754, 755, Title 7, (See Appendix, p. 29) 8, 29

Constitution of Ala., 1901, Article 6, Section 140 9

Section 10 of Art. 1, Constitution of United States 3, 8, 12

Section 1 of the 14th Amendment to Constitution of United States 3, 8

Rules of Practice of Supreme Court of Alabama, Rule 38—Re-Hearings, etc. 16

TEXTBOOKS

27 R. C. L., p. 71, 72 18

Hughes Federal Procedure 11

20 C. J., p. 1236, Section 597 12

Appendix 29

IN THE

SUPREME COURT OF THE UNITED STATES

Appealed from the Supreme Court of Alabama

OCTOBER TERM, 1947

No. 741

GEORGE D. FINLEY, ET ALS.,
Appellants,

v.

THE CITY OF TARRANT CITY, ET ALS.,
a municipal corporation, et als.,
Appellees.

BRIEF AND ARGUMENT OF APPELLANTS OPPOSING THE MOTION TO DISMISS THE APPEAL

I

OPINIONS OF THE SUPREME COURT OF ALABAMA

Opinions of the Supreme Court of Alabama are reported as follows: *Finley, et als., vs. Tarrant City, et als.,* 32 So. 2d, 806, decided October 16, 1947; re-hearing denied December 18th, 1947.

II

JURISDICTION

Appellants applied to the Chief Justice of the Supreme Court of Alabama for an appeal to the Supreme Court of the United States to review the judgment of said State Supreme Court, rendered by it on October 16, 1947, rehearing denied December 18, 1947, under Section 237(a) of the Judicial Code, as amended (36 Stat. 1156, 43 Stat. 937, 45 Stat. 54, 28 U. S. C. A. 344(a), which reads in part as follows: "APPELLATE JURISDICTION OF DECREES OF STATE COURTS: CERTIORARI: a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had . . . where is drawn in question the validity of a . . . statute of any State, on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error (now "appeal,"—January 31, 1928, c. 14, Sec. 1, 45 Stat. 54"). Said order allowing said appeal was entered on March 11, 1948.

III

STATEMENT OF CASE

(When this brief was printed *no printed record* (only the transcript) in said cause was available. We have been as definite as possible in our references.)

On August 12, 1935, George D. Finley, Hattie Finley, Alta Finley, and Frances Finley, appellants, filed their suit in the equity division of the Circuit Court of Jeffer-

BLEED THROUGH— POOR COPY

son County, Alabama, against the City of Tarrant, a municipal corporation, and Z. D. McCuen, Clerk of said City, appellees, seeking, as pertinent to this appeal (Motion to Dismiss), (a) an injunction to restrain said City from selling certain real estate owned by appellants to satisfy certain improvement assessments made on two separate streets passing through said property, *until* certain appeals from said assessments theretofore PERFECTED BY APPELLANTS to the Circuit Court of Jefferson County, Alabama, each providing for a "trial by jury," could be tried; (b) the recovery of certain strips of land belonging to appellants or reasonable compensation therefor, which said city took without a deed or condemnation proceeding to enlarge, or form Jackson Boulevard, Elm Avenue, and a strip of land (15 ft. wide and 366 ft. long) said City "took" to form an "alley"; (c) damages for "changing the grade" in Elm Avenue, and also Jackson Boulevard, whereby ingress and egress from appellants' adjacent lands to said streets is impracticable (which the Supreme Court has ruled to be a "taking without due process of law"); (d) a declaratory judgment holding that said ordinances Nos. 12, 38, and S-1, and the assessments made thereunder are illegal and void, and repugnant to the Constitution of the United States, namely: Section 1 of the 14th Amendment of the Constitution of the United States, which prohibits the City from passing any ordinance which deprives appellants of their property without due process of law, or denying them the equal protection of the law; and Section 10 of Article 1 of said United States Constitution, which prevents said City from passing any ordinance which IMPAIRS THE OBLIGATIONS OF ITS CONTRACT made by it prior thereto with Mrs. N. J. Finley, mother and ancestor of

appellants, July 7th, 1924; wherein said City agreed, in consideration for a certain strip of land for a street now known as Jackson Boulevard, said City would GRADE SAID STREET AT ITS EXPENSE and without expense to appellants (which said GRADING WAS ABOUT 95 per cent of the cost of the improvement thereon), and also to REBUILD CERTAIN FENCING which said City destroyed in the building of said street, and to build a sufficient retaining wall to protect a certain spring on said property adjacent to said street,—(None of Which Was Done By Said City—until 1929-30, when ONLY the grading was done,—and WHEN THAT WAS DONE, said City by ordinance No. 38, under which said improvements on said Jackson Boulevard were made, PROVIDED THEREIN THAT THE ENTIRE COST OF SAID IMPROVEMENT ON SAID STREET THROUGH SAID PROPERTY including THE GRADING would be assessed against the abutting property of appellants, THEREBY IMPAIRING THE OBLIGATIONS OF THE CONTRACT made July 7th, 1924; (e) recovery of a strip of land 30 ft. wide and 877 ft. long, which had been acquired by the Birmingham Electric Co., for a right of way for a STREET CAR LINE—AND NO OTHER PURPOSE—in a condemnation proceeding in 1916 against said Mrs. N. J. Finley, mother of appellants, and which right-of-way REVERTED TO THE ESTATE OF APPELLANTS when said Birmingham Electric Co. SOLD AND CONVEYED ITS SAID RIGHT OF WAY (or a portion thereof) to said City FOR STREET PURPOSES (a different purpose THAN RAILWAY USES) in 1929, just prior to the adoption of said Ordinance No. 38, AND WHICH TITLE TO SAID STRIP OF LAND SAID CITY

HAS NEVER ACQUIRED THERETO FROM APPELLANTS; (f) a cancellation of said assessments made under said UNCONSTITUTIONAL ORDINANCES,—and the EXCESSIVENESS of said assessments, EVEN WERE SAID ORDINANCES IN ANY WAY LEGAL,—said excessiveness being due in part to the inclusion of illegal items therein, such as the adding thereto of the cost of the REMOVAL OF SAID CAR TRACK IN SAID STREET FOR SAID BIRMINGHAM ELECTRIC CO., and also the COST OF GRADING ITS SAID RIGHT OF WAY THRU SAID PROPERTY, and then adding AS AN ADDED BURDEN ON APPELLANTS ALL OF SAID COSTS (which under the laws of Alabama (see Code 1940, Sec. 528 Tit. 37, Appendix, p. 29) such railroads are required to pay their share of) said costs being in the sum of $5,000.00 or more; that said excessiveness of said assessments thus made up, was a "taking" of appellants property without due process of law, in violation of Sec. 1 of the 14th Amendment to the Constitution of the United States.

It is claimed by appellants that if the said right of way of said Birmingham Electric Co., did NOT pass to said City in its said conveyance of 1929 to said City,—then all of the cost of said improvement made by said City on said right of way SHOULD HAVE BEEN CHARGED TO AND PAID BY SAID BIRMINGHAM ELECTRIC CO., as the statutes provide (see appendix, p. 29); IF said title to ANY PART of said right of way passed in said conveyance to said City,—THEN whatever portion of said right of way passed or attempted to pass to said City, did NOT PASS, but said PORTION REVERTED to appellants' estate, and they own same, and said City

NOT HAVING ACQUIRED ANY TITLE FROM APPELLANTS is a trespasser thereon, and NOT having gotten title thereto, its said Ordinances were invalid, and they had *no jurisdiction to improve said streets.*

The complaint, and amendments thereto, filed by appellants in the lower state court contained several *paragraphs or counts, in which various strips of land,* which had been "taken" by said City to enlarge or form said two streets and said "alley" were sought to be recovered, or the reasonable value thereof. In its decree on the demurrer to said bill and amendments, the lower state court sustained the demurrer of appellees AND DISMISSED SAID BILL as to *all said phases or paragraphs,* except that which sought injunctive relief. Said case on demurrer was submitted by agreement, without oral argument, and said DISMISSAL was contained in the SAME RULING on the Demurrer; and appellants were not given any chance for any amendment, and no chance to REQUEST AN AMENDMENT. Said Dismissal being a final decree as to those counts or phases that were DEMURRED TO AND DISMISSED.

The appellants duly filed and perfected their appeal to the Supreme Court of Alabama, to review said lower state court. In its judgment, the Supreme Court of Alabama "CORRECTED and AFFIRMED" the lower state court as follows: It ruled that appellants were entitled to the injunctive relief to prevent the sale by said City of said property UNTIL SAID APPEALS FORMERLY TAKEN could be tried,—and also it ruled that appellants were entitled to recover reasonable compensation for land taken by said City to widen Elm Avenue through said property, BUT denied appellants all other relief. The ef-

fect of said RULING in its said final decree by the Supreme Court of Alabama unless modified or reversed PREVENTS appellants from recovering the two strips of land in Jackson Boulevard,—one 30 ft. by 877 ft. strip that REVERTED when the Birmingham Electric Co. SOLD ITS SAID RIGHT OF WAY TO SAID CITY; the other, is the 30 ft. by 877 ft. strip that said City "took" under an agreement to GRADE AND IMPROVE AT ITS EXPENSE AS THE CONSIDERATION THEREFOR,—and never did, but charged same to appellants; the other strip of land is the "'alley" said City "took" without deed for an Alleyway thru said property, —a strip of land 15 ft. by 366 ft.

All of said strips of land were sued for in the Original Bill, in the amendments thereto, in the substitute bill; and in the amendment to said substitute bill, said property was more particularly described and sued for.

MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED

The Federal questions were raised at the outset; first, in the "Protest, Objections and Defenses" filed in 1930 in the office of the Clerk of said City (T. 141); also in the original bill filed August 12, 1935 (Tr. 5); also in the substitute bill, filed in 1941 (Tr. 46, 47); also in amendment to substitute bill (Tr. 67, par. E); (Tr. 68, par. F; Tr. 69, par. I; Tr. 70, par. K; Tr. 71, par. L; Tr. 70, par. N; Tr. 74, par. Q, 1, 2, 3) and also in the Assignment of Error filed on appeal from the lower State Court. The PROTEST, THE PLEADINGS AND ALSO THE ASSIGNMENTS OF ERRORS, each and all, alleged that said ordinances were illegal, null and void, and un-

constitutional under the due process clauses of the Constitution of Alabama and ALSO under the Constitution of the United States, Section 1, 14th Amendment, and Section 10 of Article 1 of the Constitution of the United States, which prevents said City from impairing the obligations of its contract made July 7, 1924, by it and appellants' mother, by said Ordinance No. 38 of said City, adopted by it in 1929.

PRINCIPLES AND PROPOSITIONS

1. The judgment of the Supreme Court of Alabama was a *final decree* insofar as it sustained the decree of the lower state court in sustaining the demurrers to the Bill of Complaint, as amended, and in *dismissing* it as to certain portions of relief therein sought.

Code of Alabama, 1490, Sections 754, 755.

Ex Parte, Elyton Land Co., 104 Ala., 88, 15 So. 939.

Carter v. Carter, 225 Ala. 287, 142 So. 514.

Pollack v. Stouts Mountain, etc., Coal Co., 184 Ala. 331, 63 So. 531.

Moorer v. Chastain, 247 Ala. 676, 26 So. 2d, 75.

Box. v. Box 247 Ala. 291, 24 So. 2d, 28.

Wynn v. Tallapoosa County Bank, 168 Ala. 469, 53 So. 228.

South, etc., R. Co., v. Highland Ave., etc., R. Co., 104 Ala. 233, 16 So. 112.

Brush Electric Co. v. Electric Impr. Co., 51 Fed. 557, 2 C. C. A. 373.

Mutual Reserve Fund L. Ins. Ass'n v. Smith, 169 Ill. 264, 48 N. E. 208.

Thompson v. Murphy, 93 Fed. 2d, 38.

Moreno v. United States, 120 Fed. 2d, 128.

Galloway v. Gen'l Motors Accept. Corp., 106 Fed. 2d, 466.

Washington v. Beeman, 91 Fed. 232.

Collins v. Metro-Goldwyn Pict. Corp., 106 Fed. 2d, 83.

2. The judgment of the Supreme Court of Alabama (being the court of last resort in Alabama) is a final judgment on the matters ruled on by it; and unless it is modified or reversed, appellants will be deprived of certain property and rights guaranteed to them by the Constitution of the United States, sought in said suit.

Constitution of Alabama, 1901, Art. 6, Section 140.

Worthington v. Worthington, 215 Ala. 447, 111 So. 224.

Ex parte Bibb, 44 Ala. 140.

Pollack v. Stouts Mountain, etc., Coal Co., 184 Ala. 331, 63 So. 531.

Dinsmore v. J. H. Calvin & Co., 216 Ala. 503, 113 So. 522.

Dudley v. Whatley, 245 Ala. 202, 16 So. 2d, 192.

Matthews v. Matthews, 247 Ala. 472, 25 So. 2d, 259.

3. The judgment appealed from determined the validity of the municipal ordinances with respect to their repugnancy to the Constitution of the United States.

(See *Finley, et als., v. City of Tarrant, et als.*, reported in 32 So. 2d, 806, second paragraph of opinion, page 809, where the Supreme Court quoted from Ex parte Finley, 246 Ala. 218, 20 So. 2d, 98—a mandamus proceeding.)

(A) *Whether question* of a defendant's *constitional rights* was adequately *presented and decided in state court* is *itself a Federal* question."

Lovell v. City of Griffin, Ga., 303 U. S. 444, 58 S. Ct. 666, 82 L. ed. 949.

Broad River Power Co. v. State of S. C. ex rel, Daniel, 281 U. S. 537, 50 S. Ct. 401, 74 L. ed. 1023.

(B) When the decision in State Court involves Federal and Local question, the Supreme Court of the United States will take it to review.

United States vs. Pink, 62 S. Ct. 552.

Fox River Paper Co. v. R. R. Commission of Wisconsin, 47 S. Ct. 669, 274 U. S. 651, 71 L. ed. 1279.

Joines v. Patterson, 47 S. Ct. 706, 274 U. S. 544 71 L. ed. 1194.

First National Bank of Guthrie Center, v. Anderson, 46 S. Ct. 135, 269 U. S. 341, 70 L. ed. 295.

(C) "Where the decision of the State Court *ignores* the *Federal* question to the *point* that it *almost may seem* as if the State Court *intended to prevent* review by the Supreme Court of the United States, by basing its decision upon probably insufficient non-Federal grounds, the Supreme Court has indicated

that in such a case it would review the case, though apparently one never has come before it." *Hughes Fed. Procedure.*

Johnson v. Risk, 137 U. S. 300, 11 S. Ct. 111, 34, L. ed. 683.

Leathe v. Thomas, 207 U. S. 93, 28 S. Ct. 30, 52 L. ed. 118.

4. The judgment appealed from is a decision in favor of the validity of the ordinances alleged to be repugnant to the Constitution of the United States.

(See opinion, *Finley, et als. v. City of Tarrant, et als.*, 32 So. 2d. 806, par. 2, on page 809; also the last par. on page 809; also the first and third pars. on page 810)—And the cases cited under "Principles and Proposition No. 3" herein.

5. The judgment appealed from did dispose of certain portions of the litigation between the parties.

(See opinion, *Finley v. Tarrant City*, 32 So. 2d, 806, par. 2, page 809, and the first and third pars. on page 810)—and see cases cited under "Principles and Propositions No. 3" herein.

6. The judgment appealed from shows on its face that the question of the validity vel non of the ordinances alleged to be unconstitutional was decided.

(See *Finley v. Tarraut City*, 32, So. 2d 806,—and the cases cited under "Principles and Propositions No. 3" herein.)

7. That portion of the right-of-way of the Birmingham Electric Co. (which it acquired in its condemnation

proceedings for use for STREET RAILWAY ONLY) was abandoned by it when it sold same to said City in 1929, for a different purpose, NAMELY, A PUBLIC STREET.

Ala. Power Co. v. Dailey, 31 Ala. App. 44, 18 So. 2d, 142.

20 C. J., p. 1236, Sec. 597.

Strong v. Brooklyn, 68 N. Y. 1.

Penn. v. Platt, 47 Ohio St. 366, 25 N. E. 1028.

Heard v. Brooklyn, 60 N. Y. 242.

The People v. Lawrence, 54 Barb. (N. Y.) 589.

8. Ordinance No. 38, adopted by said City *in 1929* which provided that the costs of the "GRADING" of said Jackson Boulevard, with other items, should be paid by appellants IMPAIRED the contract of *July 7, 1924*, wherein said City had agreed to pay for such GRADING and other expenses.

Constitution of United States, Section 10, Art. 1.

Northern Ohio. T. & L. Co., v. State of Ohio, etc., 38 S. Ct. 196, 245 U. S. 574, 62 L. ed. 481.

Rees v. City of Watertown, 86 U. S. 107, 19 Wall. 107, 22 L. ed. 72.

In re State, etc., on Foreign-Held Bonds, 82 U. S. 300, 15 Wall. 300, 21 L. ed. 179.

9. The said City did not acquire title to said strip of land in said streets (said Jackson Boulevard and said "Alley") by prescription of 20 years user, as is required by the laws of Alabama.

Jackson v. Bohlin, 16 Ala. App. 105, 75 So. 697.

Bellview Cemetery Co. v. McEwers, 174 Ala. 457, 57 So. 375.

Parker v. Fuller, 248 Ala. 457, 28 So. 2d, 207.

10. Where a pleading sets up a right claimed under the laws of the United States, the United States Supreme Court, on review, must determine FOR ITSELF the question of the sufficiency of the allegations, AND IS NOT CONCLUDED BY THE VIEW TAKEN BY THE HIGHEST COURT OF A STATE.

Boyd v. Nebraska, 143 U. S. 135, 36 L. Ed. 103, 12 S. Ct. 375.

Mitchell v. Clarke, 110 U. S. 643, 28 L. ed. 283, 4 S. Ct. 170.

11. Where a right claimed under a Federal law is in question, and the highest court of a state has *sustained a demurrer* to a *pleading* which attempts to assert such right, the United States Supreme Court, on review, will determine FOR ITSELF what particular facts were sufficiently well pleaded to have been admitted by the demurrer.

Covington & L., etc., Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 St. Ct. 198.

Hanley v. Donaghue, 116 U. S. 1, 29 L. ed. 535, 6 S. Ct. 242.

12. Local practice will never be allowed to defeat a plain assertion of a Federal right.

Davis v. Wechsler, 263 U. S. 22, 68 L. ed. 143, 44 S. Ct. 13.

13. The law of the United States CANNOT BE EVADED by the forms of local practice.

Rogers v. Alabama, 192 U. S. 226, 48 L. ed. 417, 24 S. Ct. 257.

Am. R. Expr. Co. v. Levee, 263 U. S. 19, 68 L. ed. 140, 44 S. Ct. 11.

Ward v. Love County, 253 U. S. 21, 64 L. ed. 758, 40 S. Ct. 419.

14. When matters nominally of procedure are actually matters of substance which affect a FEDERAL RIGHT, the decision of the State Court is subject to review.

Centr., Ves. R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 S. Ct. 865, Ann. Cas. 1916B, 252.

New Orleans, etc., R. Co. v. Harris, 247 U. S. 367, 62 L. ed. 1167, 38 S. Ct. 535.

Seaboard, etc., R. Co., v. Renn, 241 U. S. 290, 60 L. ed. 1006, 36 S. Ct. 567.

15. "Where there are two or more counts in a declaration alleging distinctly different causes of action, there may be more than one final judgment on which writs of error may be taken, and the fact that such distinct judgments are contained in the same entry, and that one in favor of the plaintiff on one count has been satisfied, WILL NOT PREVENT his maintaining a writ of error to review ANOTHER IN FAVOR OF THE DEFENDANT on different counts to which DEMURRERS WERE SUSTAINED."

Washington v. Beeman, 91 Fed. 232.

Collins v. Metro-Goldwyn. Pict. Corp., 106 Fed. 2d, 83.

Moreno v. United States, 120 Fed. 2d, 128.

Pollack v. Stouts Mountain, etc., Coal Co., 184 Ala. 331, 63 So. 531.

16. "Where a court of equity has assumed jurisdiction for injunctive relief, it will RETAIN the bill for ALL PURPOSES necessary to a complete determination and settlement of the matters involved, THOUGH THEY BE OF PURELY LEGAL NATURE."

May v. Lowery, 214 Ala. 230, 107 So. 67.

Evans v. Wilhite, 176 Ala. 287, 58 So. 262.

Tyler v. Copham, 245 Ala. 151, 16 So. 2d. 316.

Ala. Home Bldg. & L. Ass'n v. Amos, 233 Ala. 367, 172 So. 102.

BRIEF AND ARGUMENT

Since this hearing is confined to the "Motion to Dismiss the Appeal," the argument will be limited largely to the grounds in said motion, which we shall take up in the order as set forth by appellees.

1. The appellees contend that "the judgment of the Supreme Court of Alabama is an interlocutory decree affirming in part a decree of the trial court sustaining demurrers to an amendment to a Bill of Complaint."

The answer to that is that said decree of said Supreme Court of Alabama is final as to THOSE PORTIONS OR COUNTS of said bill to which demurrers were SUSTAINED AND THE BILL DISMISSED, thereby

eliminating said portions or counts from said suit and denying appellants relief thereunder. *Ex parte, Elyton Land Co.,* 104, Ala. 89, 15 So. 939; *Carter v. Mitchell,* 225 Ala. 257, 142 So. 514; *Pollack v. Stouts Mt. Coal Co.,* 184 Ala. 331, 63 So. 531; *Washington v. Beeman,* 91 Fed. 232; *Collins v. Metro-Goldwyn Pict. Corp.,* 106 Fed. 2d, 83.

2. Appellees' Ground No. 2: "The judgment appealed from is not a final judgment."

The answer to that is that since the Supreme Court of Alabama is the court of last resort in Alabama, wherein ONLY ONE application for re-hearing is allowed, said judgment is final as to those matters ruled on by it in its decision of October 16, 1947, AND REHEARING DENIED DECEMBER 18th, 1947. Article 6, Section 140 of the *Constitution of Alabama,* for 1901 (the latest Constitution of said State), reads in pertinent part as follows: ". . . the Supreme Court shall have appellate jurisdiction only, which shall be co-extensive with the State";— *Pollack v. Stouts Mt. Coal Co.,* 184 Ala. 331, 63 So. 531; *Worthington v. Worthington,* 215 Ala. 447, 111 So. 224. *Rules of Practice* in Supreme Court of Alabama provide in pertinent part as follows: "Rule 38 (41, 42) *Rehearings, Applications; Time for Filing*:—". . . and no second application shall be received or filed in any case . . ." In the instant suit an application for re-hearing was duly filed and denied by the Supreme Court of Alabama on December 18, 1947 (Tr. 102-1), (see Finley v. Tarrant City, 32 So. 2d, 806) which became operative and final on said date, and unless said judgment is modified or reversed appellants will be "shorn" and deprived of their said lands "taken" by said City to widen, enlarge or form

said Jackson Boulevard and said "Alley," as well as other relief sought in said suit.

3. In this Ground No. 3: Appellees contend:—"The judgment appealed from has in no sense determined the validity of any statute or municipal ordinance with respect to its repugnancy to the Constitution, treaties or laws of the United States."

The answer to that is found in the opinion of the Supreme Court of Alabama, in this case, reported in *Finlay v. Tarrant City*, 32 So. 2d, 809, second par., from top of page, which is adopted from decision in *Ex parte Finley*, 246 Ala. 218, 20 So. 2d, 98 (which was a mandamus proceeding), which quoted portion reads, in part, as follows: "The only relevancy of the unanswered interrogatories pertains to that phase of the BILL WHICH SEEKS TO DECLARE THE ORDINANCES INVALID." (Emphasis supplied.) In the case of *New York, ex rel. Bryant v. Zimmerman, et al.*, 278 U. S. 63, 73 L. ed. (adv. 52), 49 S. Ct. 61, we find the following: "There are various ways in which the validiy of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. NO PARTICULAR FORM OF WORDS OR PHRASES is essential, but ONLY that THE CLAIM OF INVALIDITY and the Ground therefor be brought to the ATTENTION OF THE STATE COURT with fair precision and in due time. *And if the record as a whole shows* either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented. (Citing: *Cranwell v. Randall*, 10 Pet. 368, 9 L. Ed. 458; *Neilson v. Lagow*, 12 How. 98, 13 L. ed. 909; and many other cases. Quoting further from

said opinion: "Of course, the decision must have been against the claim of invalidity, BUT IT IS NOT NECESSARY THAT THE RULING SHALL HAVE BEEN PUT IN DIRECT TERMS. IF THE NECESSARY EFFECT OF THE JUDGMENT has been to DENY THE CLAIM, THAT IS ENOUGH." (Citing: *Cranwell v. Randell,* supra; *Chapman v. Goodnow* (Chapman v. Crane), 123 U. S. 540, 31, L. ed. 235, 8 S. Ct. 211; *Bells Gap R. Co., vs. Penn.,* 134 U. S. 232, 33 L. ed. 892, 10 S. Ct. 533; *St. Louis, etc., R. Co. vs. Starbird,* 243 U. S. 601, 61 L. ed. 923, 37 S. Ct. 462."—and other cases.)

In 27 R. C. L., p. 71-72, we find the following: "If a Federal question appears in the record and was decided, or such decision was necessarily involved in the case and the case could not have been determined without deciding such question, the fact THAT IT WAS NOT SPECIALLY SET UP AND CLAIMED is NOT CONCLUSIVELY AGAINST A REVIEW. (Citing: *Passaic River Bridges v. Hoboken, etc., Land Co.,* 1 Wall. 116, 17 U. S. (L. ed.) 571, and many other cases.) . . . *"And in order to determine whether the validity of a statute was drawn in question* it is proper to INSPECT THE PLEADINGS in the cause as well as the judgment of the Court. (Citing: *Craig v. Mo.,* 4 Pet. 410, 7 U. S. (L. ed.) 903.) "This *right to review* and the limitations thereon have been most frequently recognized in cases INVOLVING QUESTIONS OF DUE PROCESS of law (*Davidson v. New Orleans,* 96 U. S. 97, 24 U. S. (L. ed.) 616, and other cases cited), and the validity of statutes on the ground of IMPAIRING CONTRACT RIGHTS. (*Picqua, etc., Bank v. Knoop,* 16 How. 369, 14 U. S. (L. ed.) 977, and other cases cited.)

In the case of *Broad River Power Co. v. S. Car. ex rel, etc., Daniel*, 281 U. S. 537, 74 L. ed. 1023, we find the following: "Whether the state court has denied to rights asserted UNDER LOCAL LAW the protection which the Constitution guarantees, *is a question* upon which the petitioners are ENTITLED TO INVOKE the JUDGMENT OF THIS COURT. EVEN THOUGH THE CONSTITUTIONAL PROTECTION INVOKED BE DENIED ON NON-FEDERAL GROUNDS, it is the province of this court *to inquire* whether the decision RESTS UPON A FAIR OR SUBSTANTIAL BASIS. If *insubstantial*, constitutional obligations MAY NOT BE THUS EVADED. (Citing: *Fox River Paper Co., v. R. R. Co.*, 274 U. S. 651, 71 L. ed. 1279, 47 S. Ct. 669, and other cases.)

In Ground 4, appellees allege: "The judgment appealed from is not a decision in favor of the validity of the ordinances alleged to be repugnant to the Constitution of the United States."

The answer to that is, that the *validity* of the Ordinances was attacked in the pleadings (Tr. 4, par. 7; Tr. 5, par. 12; Tr. 38, par. 3; Tr. 38, par. 2; Tr. 39, par. 4; Tr. 49, par. 6; Tr. 44, par. 12; Tr. 44, par. 13; Tr. 45, par. 15; Sections (b), (c), (d), (f), (i), (j), (m), (n), Tr. 66, par. D; Tr. 67, par. E; Tr. 68, par. F; Tr. 68. par. G; Tr. 69, par. H; Tr. 69, par. I; Tr. 70, par. J; Tr. 71, par. L; Tr. 72, par. M; Tr. 72, par. N; Tr. 73, par. O; Tr. 74, par. P, were attacked on the ground that they were repugnant to the Constitution of the United States. (The reason for so many citations to the pleadings above, is, that the Original Bill, and amendments made, all contained allegations of the *invalidity* of

said Ordinances—even the Protest filed (Tr. 141) attacked the validity of said Ordinances. The said Protest, with its several grounds attacking said Ordinances and assessments, was ADOPTED AND MADE A PART OF THE PLEADINGS AS AN EXHIBIT THERETO (Tr. 39; also Tr., Exhibit F. 141). Also, said Ordinances' validity was attacked in the Assignments of Error to the lower state court (Tr. 102 D) as well as in the briefs filed by appellants in the Supreme Court of Alabama in said cause.)

Thus we see that the Supreme Court of Alabama had before it in said *pleadings*, and in said *assignments of error*, and in said *briefs* of appellants, said attacks made on the validity of said Ordinances. Now, let us examine the opinion ITSELF rendered in said case and see what was CONSIDERED, and decided by the Court. To do this, we will quote certain excerpts from said opinion: (See *Finley v. Tarrant City*, reported in 32 So. 2d, 806: Therein we find the following expressions: "Upon CAREFUL CONSIDERATION WE HAVE CONCLUDED, etc." (emphasis supplied) . . . "one paragraph IS FOR TAKING THE LANDS WITHOUT DUE PROCESS" (par. 5, page 809) . . . "*We see nothing in the case* which should give the complainants ANY FURTHER RIGHT OF AMENDMENT" . . . In the 9th paragraph of said opinion (*Finley v. Tarrant City*, 32 So. 2d, 806) the Court QUOTES from the opinion, *Ex parte Finley*, 246 Ala. 218, 20 So. 2d, 98, a mandamus proceeding by said Finley, in part as follows: "The only RELEVANCY OF THE UNANSWERED interrogatories pertains to that PHASE OF THE BILL WHICH SEEKS TO DECLARE THE ORDINANCES INVALID . . ."

BLEED THROUGH- POOR COPY

We see from the above expressions of the Court that IT DID PASS ON THE VALIDITY OF THE ORDINANCES as to their being repugnant to the Constitution of the United States. If the Supreme Court of Alabama IGNORED THE FEDERAL questions raised, we find that this Court has *indicated that it would review the case* (*Johnson v. Risk*, 137 U. S. 300, 11 S. Ct. 111, 34 L. ed. 683; *Leathe v. Thomas*, 207 U. S. 93, 28 S. Ct. 30, 52 L. ed. 118).

In this instant case, both local and Federal questions were raised—in the Pleadings, in the Protest (which was made a part of the bill), and in the Assignment of Errors, and in the Briefs. In the case of *First Nat. Bank v.* Anderson, 46 S. Ct. 135, 269 U. S. 341, 70 L. ed. 295, we find, and quote the following: "In cases coming from STATE COURTS this Court's *power and concern* are *specially* directed to RULINGS MADE OR REFUSED ON FEDERAL QUESTIONS." (Citing: *Murdock v. Memphis*, 20 Wall. 590, 22 L. ed. 429, and other cases cited.)

The easement or right-of-way acquired by Birmingham Electric Co. from Mrs. N. J. Finley, in condemnation proceedings in 1916, was clearly abandoned by it when it sold same to said City by its deed of August 22, 1929 (Exhibit D, Tr. 135), and said portion conveyed REVERTED to the estate of appellants. *Ala. Power Co. v. Dailey*, 31 Ala. App. 44, 18 So. 2d, 142; *Strong v. Brooklyn*, 68 N. Y. 1; *Heard v. Brooklyn*, 60 N. Y. 242,—and cases cited under proposition No. 7 herein. An excerpt from said deed reads: "It being the INTENTION of the parties hereto that this conveyance shall and does hereby grant to the said City of Tarrant City *all the right, title*

and interest of the Birmingham Electric Co., IN AND TO SAID STRIP OF LAND, 30 feet wide used by the said Birmingham Electric Co., for a street railway right of way, etc. . . . "reserving the right to operate a SINGLE TRACK RAILWAY on said street (Jackson Boulevard), etc. . . ." (Fifth) paragraph of said Deed: "That in the event the said City of Tarrant City decides to improve said street or highway by PAVING the same or portions thereof, the center portion thereof, of the width of 10 feet, . . . shall NOT be paved . . . but the pavement shall extend only to the sides of said 10-foot strip in the center of said street . . . ". "In the event the Birmingham Electric Co. SHALL BE REQUIRED to pay the cost of improving or paving ANY PORTION OF SAID STREET . . . then in that event the said City of Tarrant City will reimburse the said Birmingham Electric Co., on demand, for any such amounts which it shall have been required to pay." The above said deed or agreement, was made SUBESQUENT TO AND SUBJECT to the deed or agreement made by said City with Mrs. N. J. Finley, July 7th, 1924, which reads in part as follows (Tr. 129, Exhibit C): ". . . as a part of the consideration hereof, it is agreed and understood that the Town shall at ITS OWN EXPENSE AND WITHOUT EXPENSE TO VENDORS remove the wire fence . . . and place same along the property line, etc., etc., . . . It is further understood and agreed that the Town shall construct AT ITS OWN EXPENSE, AND WITHOUT EXPENSE TO VENDORS a retaining Wall of Cement, etc., . . . to protect a certain spring adjacent to said street," etc. . . . "It is further understood and agreed that the Town shall GRADE BOTH SIDES OF SAID STRIPS OF LAND within a reasonable time, etc. . . .".

BLEED THROUGH– POOR COPY

The said City complied fully with its agreement WITH SAID BIRMINGHAM ELECTRIC CO., but it DID NOT COMPLY IN ANY PARTICULAR WITH THE DEED OR AGREEMENT IT HAD MADE July 7th, 1924—(a long time PRIOR to said deed from Birmingham Electric Co.)—and it "shifted" the expense of IMPROVING SAID CAR TRACKS onto and included same in the assessments it made against appellants' property,—thereby ADDING AN UNEQUAL AND ADDITIONAL BURDEN to appellants and thereby denying to appellants the equal protection of the law; and thereby "taking" appellants' property without due process of law.

Ordinance No. 38, which was adopted by said City on September 3rd, 1929 (AFTER and SUBJECT TO the Deed of Mrs. N. J. Finley, of July 7, 1924), reads in part as follows (Exhibit A, Tr. 127): "Section 1. That Jackson Street . . . shall be graded . . . That the roadway for a width of 22 feet on each side of the center line of Jackson Street . . . shall be paved with one course Portland cement concrete pavement 7 inches thick with integral curb 6 inches thick. . . . Provided, however, that the area between the tracks and the rails of the tracks and for 29 inches outside of the outside rails of the tracks of the Birmingham Electric Co., on Jackson Street . . . shall not be paved with concrete pavement but shall be macadamized." . . . (Note: All except 10 ft., in center of said street was GRADED AND PAVED BY said City at said time.) Section 3, in part, of said ordinance, reads (Tr. 128, Ex. A): "That the cost of constructing said improvements shall be assessed against the property abutting on the portions of the highways so improved . . .'

We thus see from the above "excerpts" that appellants have been "deprived" of a strip of land 30 ft. wide and 877 ft. long on Jackson Boulevard by said City in that it did NOT COMPLY WITH ITS SAID AGREEMENT of July 7, 1924, and GRADE SAID STREET AT ITS OWN EXPENSE,—but instead CHARGED ALL OF SAME TO APPELLANTS; also appellants were "deprived" of another strip of land on said street 30 ft. wide and 877 ft. long,—the land that was ABANDONED BY SAID BIRMINGHAM ELECTRIC CO., AND which REVERTED TO APPELLANTS WHEN SAME WAS CONVEYED TO SAID CITY BY SAID BIRMINGHAM ELECTRIC CO. True, Birmingham Electric Co. "assumed" that said easement to said City had been dedicated,—but it evidently had NOT read said deed of July 7, 1924, executed by Mrs. N. J. Finley, and said City,—it is said that "even Homer nods" occasionally.

Now, let us see about Elm Avenue, which crosses said Jackson Street, through said lands of appellants. The improvement under each Ordinance—Ordinance No. 38 and Ordinance No. 12—was done at same time practically. From the deed (Tr. 75, 76), we find that said Elm Avenue (formerly known as County Road, also as First Avenue), was only 20 feet wide UNTIL said City graded and paved same; that now (by actual measurement) it is 35 feet wide, and that said City never did acquire a deed to said extra 15 feet from appellants through whose lands same runs. "Assessment certificates issued against abutting property for street improvements prior to the acquirement of the right-of-way for, and the legal establishment of, the street, are void."—*City of Palmetto v. Katsch*, 98 So. 352; *Detroit, etc., Ry. Co. v. Detroit*, 49 Mich. 47, 12

N. W. 904; *Harmon v. City of Omaha,* 53 Nebr. 164, 73 N. W. 671; *City of Mobile v. Smith,* 136 So. 851, 223 Ala. 480.

The first strip of land said City "took" from appellants was the "alley,"—a strip 15 ft. wide and 366 ft. long. It was taken under an Ordinance (which could not be located at the City Hall by counsel for appellants and the present City Clerk). Said Ordinance was adopted in 1923, and provided for the construction of a sewer along and under said alley, which was taken also for public roadway. The appellants were not residing on said lands at said time—it was rented out to a tenant—and they did not know of said "taking" of said alley until some time later, when they filed this suit, which was filed August 12, 1935. In said original bill they sued for all of the property described in Exhibit A, attached thereto, among which was said lands comprising said "alley"; later they claimed it more definitely in later pleadings. There has been no LIMITATIONS OF ACTIONS RUN AGAINST THEIR SAID CLAIM THEREFOR FROM 1923 to 1935; nor even to 1941. It requires 20 years in Alabama to perfect prescription by public user of lands. Likewise, there had been no prescription against appellants as to said strips of land in Jackson Street; they were "taken" in 1929-30 by said City; so, prescription has not run as to said strips of land, nor any of them.

It has been held in numbers of cases, that "An ordinance assessing the ENTIRE COST OF A STREET IMPROVEMENT AGAINST ABUTTING OWNERS WHERE A STREET RAILROAD was by a prior subsisting law required to pave and keep in repair a part of such street, *was void;* and the County Court could

not enter an order eliminating from the estimated cost the portion which the railroad was bound to pay, and then recast and confirm the assessment."—*Am. Hide & Leather Co. v. City of Chicago*, 67 N. E. (Ill.) 979; *City of Alston v. Middleton Heirs*, 158 Ill. 442, 41 N. E. 926; *Smith v. Chicago*, 169 Ill. 257, 48 N. E. 445. It has also been held that ". . . the easement of a Railroad Co., itself is co-extensive ONLY with the use for which it was acquired." —*Stillman v. Chicago, etc., R. Co.*, 78 Iowa 404, 43 N. W. 275, 16 Am. S. R. 452. It is quite clear that appellants are entitled to recover the lands said City took for said "alley"; also for the strip of land that REVERTED to appellants' estate when Birmingham Electric Co. sold its right-of-way to said City; also for the strip of land said City took on Jackson Boulevard (30 ft. by 877 ft.) to enlarge said street, and which said City had agreed in writing on July 7th, 1924, that it would GRADE at its expense, but did not do so, and contrary to its agreement, it charged said costs to appellants. Appellants certainly can depend on the Constitution of the United States to protect them against such illegality and confiscation. This is still supposed to be a civilized country, where dealings and conduct by its citizenry is based on law and order, and not "might." Whenever a citizen gets to where he cannot depend on the Constitution of the United States to protect him in his property, his liberty, etc., he might as well join the disordered elements of the uncivilized world.

In Ground 5, appellees contend: "The judgment appealed from does not dispose of the litigation between the parties."

The answer to that is, that as to those phases said demurrer was substained to, and SAME DISMISSED as parts of said bill, it does dispose of some very important PARTS OF SAID LITIGATION. See cases cited and argument under points 3 and 4 supra.

In Ground 6, appellees contend: "The judgment appealed from shows on its face that the question of the vilidity vel non of the ordinances alleged to be unconstitutional has not been decided."

The answer to that is, that the excerpts quoted hereinabove from said opinion in this case styled *Finley, et als., vs. Tarrant City, et als.*, 32 So. 2d, 806, show that they were decided. The EFFECT of said judgment is very apparent. Were appellants later to seek to recover said strips of land in this case, or any other case, unless said opinion is reversed or modified, appellees would change their tune; they would THEN cite said case to show that it DID and DOES prevent appellants' recovery of said strips of land, and other relief denied them in said judgment.

IN CONCLUSION, appellants submit that this cause has all of the "ingredients" that are required by Section 237(a) of the Judicial Code, as amended, 28 U. S. C. A. 344(a), to give this Honorable Court jurisdiction of this cause; but should there be any doubt in the mind of the Court as to same, appellants move and pray the Court to reserve its opinion thereon until a hearing on the merits.

It is respectfully submitted that said Motion to Dismiss said appeal should be denied, at the costs of the appellees.

GEORGE D. FINLEY, *Attorney,*
Pro Se.

HATTIE FINLEY,
Pro Se.

ALTA FINLEY,
Pro Se.

FRANCES FINLEY,
Pro Se.

CERTIFICATE

We, the undersigned, appellants, certify that we have forwarded copies of the foregoing brief to Messrs. Graham, Bibb, Wingo & Foster, attorneys of record for appellees in the above cause, at their address in Birmingham, Alabama, by mail, postage prepaid, on this the 13th day of April, 1948.

GEORGE D. FINLEY, *Attorney,*
Pro Se.

HATTIE FINLEY,
Pro Se.

ALTA FINLEY,
Pro Se.

FRANCES FINLEY,
Pro Se.

APPENDIX

Code of Alabama, 1940, Tit. 7, Section 754 (6078) *Appeals to Supreme Court on all final Judgments.*—From any final judgment or decree of the circuit court, or courts of like jurisdiction, . . . an appeal lies to the Supreme Court, for the examination thereof as matter of right, on the application of either party, . . ."

Code of Alabama, 1940, Section 755 (6079)—*Appeals from certain interlocutory decrees.*—From any decree rendered by the circuit court in equity cases, sustaining or overruling a demurrer to a bill in equity, . . . an appeal lies from such decree, to be taken within thirty days from the rendition thereof, to the Supreme Court. Such appeal shall be heard and determined by the Supreme Court in preference to all other appeals except appeals in criminal cases; and if the decree is reversed, the court shall render such decree as should have been rendered by the court below; but nothing in this section shall prevent an assignment or errors on such decrees on appeals taken on the final determination of the cause, if no appeal is taken under this section."

(Note: "Where ruling serves to Dismiss Bill.—If the ruling on the demurrer to a bill in equity, DISMISSED the bill, then the decree becomes FINAL and is governed by the next foregoing sections, and an appeal therefrom may be taken within six months from the rendition of judgment or decree.—*Lewis v. Martin*, 210 Ala. 401, 98 So. 635.)

Code Ala., 1940, Tit. 37, Section 528 (Code 1923-28) (2189)—*Assessments as against street car or railroad*

tracks.—If there be a street, electric, or other railroad track or tracks on any street or highway improved or re-improved under this article, *the cost of such improvement,* except storm water and sanitary sewers, between the tracks and the rails of the tracks . . . *shall be paid by the owner of the raliroad,* and *shall be assessed against and form a lien* on said *railroad,* and the property connected therewith . . .".